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No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, PETITIONER

v.

SUNRAY DX OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case, entered on December 9, 1966.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. A, *infra,* pp. 15–48) are reported at 370 F. 2d 181. Its earlier opinions in this case (App. B, *infra,* pp. 49–63), denying motions to dismiss the petitions for review on jurisdictional grounds, are reported *sub nom. Amerada Petroleum Corp.* v. *Federal Power Commission* at 338 F. 2d 808, and *sub nom. Sunray DX Oil Co.* v. *Federal Power Commission* at 351 F. 2d 395. The opinion and order of the Federal Power Commission (J.A. 354–396) [1] are reported at 31 F.P.C. 623, and

[1] "J.A." references are to the joint appendix in the court of appeals.

its opinion on rehearing (J.A. 409–418) at 31 F.P.C. 1315. The Commission's later opinions and orders, providing for refunds (App. C, *infra*, pp. 65–82), are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, p. 83) was entered on December 9, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied ac-

cordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e):

> * * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission, on the basis of the applicants' allegations of emergency and without notice or hearing, issued temporary certificates of public convenience and necessity permitting producers of natural gas to sell gas at specified prices pending hearing and determination by the Commission of their applications for permanent certificates. Subsequently, in

the proceedings on the latter applications, the Commission determined the maximum initial price at which the gas could be sold consistently with the public convenience and necessity. This price was lower than those the producers had been charging under the temporary certificates. The question presented is whether the Commission is without power to require the producers to refund any of the excess collected during the interim period.

STATEMENT

This case involves more than 30 contracts for the sale of natural gas from fields in Texas, executed by a number of producers [2] in 1960 and 1961 (see J.A. 361). In each instance, the producer sought and obtained from the Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act (pp. 2–3, *supra*), a temporary certificate of public convenience and necessity that permitted it to make deliveries under the contract while the proceeding on its application for a permanent certificate was pending before the Commission. These certificates were issued on the basis of a claimed emergency condition and without notice or hearing concerning the terms under which the deliveries were to be made. Each certificate recited that the Commission was accepting the rate schedule submitted by the applicant for temporary service only, and that such acceptance did not constitute approval of any rate or charge (*e.g.*, J.A. 189–

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[2] Sunray DX Oil Company, Sohio Petroleum Company, Texaco Inc., Gulf Oil Corporation, Sun Oil Company, Edwin L. Cox, Lamar Hunt, Humble Oil & Refining Company, Union Producing Company, respondents here, and 17 others.

190). The Commission, however, had previously announced for the area in question, a provisional guideline price of 18 cents per Mcf (see J.A. 376–377). All of the prices specified in the respective rate schedules were at or below that level, save one, which was slightly below 20 cents [3] (J.A. 361; App. A, *infra,* p. 18).

After extended proceedings the Commission, on March 23, 1964, issued its final decision on the applications for permanent certificates, granting them on condition that the producers charge no more than 16 cents per Mcf (*Amerada Petroleum Corp.,* 31 F.P.C. 623, J.A. 354–396).[4] This was below most of the prices in the temporary certificates and the Commission reserved for future determination the question whether, as a further condition to the granting of the permanent certificates, the producers should be required to refund the charges collected under the temporary certificates, insofar as those charges exceeded

[3] In that instance the producer (Standard Oil Company of Texas) was issued a temporary certificate at the 18 cents guideline price (see J.A. 373). Its petition to review the Commission's grant of a permanent certificate at 16 cents (see text, this page) was dismissed on its motion by the court below.

[4] In *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (the "Catco" case), this Court had held that the Commission could not certificate a sale of natural gas if the price proposed by the seller was out of line with prevailing prices, or so high that it might trigger a general price rise. The Commission is accordingly required to specify a ceiling price in the certificate (the "in line" price). It may, of course, be higher than the just and reasonable price that the Commission might determine in a proceeding under Section 5 of the Natural Gas Act, 15 U.S.C. 717d, its purpose being merely to hold the price level pending completion of Section 5 proceedings, which have proved to be exceedingly protracted in producer cases. See 360 U.S. at 391.

the amounts which would have been collected at the 16 cents "in line" rate.

The producers filed petitions for review (consolidated in the Tenth Circuit) challenging, *inter alia,* the Commission's power to order such refunds. The Commission urged the court to dismiss the challenge as premature. The court declined (*Amerada Petroleum* v. *Federal Power Commission,* 338 F. 2d 808; *Sunray DX Oil Co.* v. *Federal Power Commission,* 351 F. 2d 395; App. B, *infra,* pp. 49–63). While the case was awaiting decision, the Commission issued its decision on the reserved question, ordering the producers to refund (with some offsets) the excessive amounts they had collected while operating under the temporary certificates (App. C, *infra,* pp. 65–82).[5] The court shortly afterwards rendered its final decision. It upheld the grant of the permanent certificates with the 16 cents in-line price condition, but ruled that the Commission had no power to order any refunds where, as here, the temporary certificates had not expressly warned the producers that they might be ordered to make refunds should the in-line price prove to be lower than the prices charged during the period of temporary authorization (App. A, *infra,* pp. 31–39).

REASONS FOR GRANTING THE WRIT

Sales of natural gas in interstate commerce for resale may not be made without a certificate of public

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[5] After the Commission acted on petitions for rehearing on December 6, 1966 (App. C, *infra,* pp. 76–82), the producers sought judicial review. The first petition for review was filed in the Tenth Circuit (*Sunray DX Oil Co.* v. *Federal Power Commission,* No. 9227), and the others are in process of being transferred to that circuit.

convenience and necessity issued by the Federal Power Commission after hearing. Natural Gas Act, § 7(c), p. 2, *supra*. Nor may the Commission grant such a certificate if the initial price at which the gas is to be sold is out-of-line. *Atlantic Refining Co.* v. *Public Service Commission of New York ("Catco")*, 360 U.S. 378. In cases of emergency, however, the Commission is empowered to grant, without any notice or hearing, temporary certificates authorizing sales during the period—which may be protracted—while the Commission conducts hearings on the application for a permanent certificate and determines the in-line price at which the gas may be sold consistently with the public convenience and necessity. Not uncommonly, the in-line price as determined after a full adversary hearing is appreciably lower than the price allowed in the temporary certificate on the basis of the producer's *ex parte* representations.

The court of appeals held in this case that the Commission may not, as a condition of granting the permanent certificate, order the producer to refund charges collected under the temporary certificate which are excessive as measured by the in-line price. This ruling presents a question of substantial importance in the administration of the Natural Gas Act, and one on which the circuits are divided. In addition, the ruling is erroneous under principles established in recent decisions of this Court.[6]

[6] There is no obstacle to the Court's reviewing this ruling. It is true that, in terms, the court below held only that the Commission had exceeded its power in reserving for future decision the question of the producers' refund liability. How-

1. The consolidated cases at bar alone would result in approximately $1.2 million in refunds, were the Commission's position sustained. Seven similar proceedings, involving claimed refunds of some $10.3 million, are pending before the Commission or the courts. But these are only the opening rounds in a series of litigations. It is estimated that there are 579 other contracts for the sale of natural gas in regard to which the identical issue may arise. The potential refund liability under these contracts cannot be estimated because the in-line prices have yet to be determined, but it is undoubtedly large.

Perhaps, for the future, the ruling below can be avoided by the inclusion in each new temporary certificate of an express condition obligating the producer to refund any charges found to be excessive

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ever, the court's holding was solely, and expressly, predicated on its view that the Commission had no power to order any refund in a case like this. If, as we think, this ruling was erroneous, *a fortiori* the court erred in ruling that the Commission could not reserve jurisdiction to determine the question. It is also true that, as noted earlier, the Commission urged the court below to dismiss the producers' challenge to the Commission's refund power as premature. The court rejected this contention because of what it deemed convincing indications that the Commission would, in fact, order refunds (App. A, *infra*, p. 32; App. B, *infra*, pp. 59-60). The court's prediction was correct. Shortly before the court's final ruling, in which it reiterated its rejection of the Commission's challenge to its jurisdiction, the Commission issued its decision on the reserved question, ordering the refunds to be made (App. C, *infra*, pp. 65-82). In the circumstances, we accept the court's ruling that the probability of a refund order was sufficiently great to permit a challenge to the Commission's refund power in advance of the actual refund order. See Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

(but see the Tenth Circuit's earlier decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 270 F. 2d 404). However, this would, of course, have no effect upon the hundreds of outstanding certificates which, as noted above, contain no such provision. The importance to producers and consumers alike of resolving the large potential refund liability that these sales involve is manifest.

2. The issue cannot be resolved without the intervention of this Court, since there is a division among the circuits. The Court of Appeals for the District of Columbia Circuit, in *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963 (the "Skelly" case), has held that in appropriate circumstances—where the balance of the equities warrants—the Commission may require the producer to refund the excess over the in-line price, even though the temporary certificate did not contain an express reminder of a potential refund obligation.

The court below attempted to distinguish *Skelly* on the ground that here the producers, in setting their temporary prices, relied on a guideline price established (albeit provisionally) by the Commission, whereas in *Skelly* there was no guideline price. The distinction will not withstand scrutiny. Assuming that reliance by the producer on a provisional guideline price is relevant in weighing the equities and in determining whether a refund should be ordered in the circumstances of a particular case (see pp. 12–13,

infra),[7] we submit that the court below did not—indeed, could not—review the Commission's appraisal of the equities in this case. In the order under review, the Commission had not ruled finally on whether refunds should be ordered; it had reserved the question (see pp. 7–8, n. 6, *supra*). Thus, the court's decision was necessarily dispositive of the broad issue of the Commission's power to order refunds in *any* case where the temporary certificate does not specify a refund obligation.[8] Its holding that the Commission lacks this power cannot be reconciled with the ruling of the District of Columbia Circuit.

3. Finally, we urge that the ruling below is erroneous. Section 7(e) of the Natural Gas Act (p. 3, *supra*) authorizes the Commission to attach "reasonable terms and conditions" to certificates of public convenience and necessity issued under Section 7(c). The conditioning power is thus in terms a sweeping one. And this Court has construed it broadly in order to advance the fundamental objective of the Act—protection of the consumer against excessive gas prices pending the determination of just and reasonable rates. *Atlantic Refining Co.* v. *Public Service Commission of New York* (*"Catco"*), 360 U.S. 378, 388. Surely, it is not unreasonable for the Commission, in granting an application for a permanent certificate at a price found consistent with the public

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[7] We point out that the court of appeals itself acknowledged that the guideline prices of the 1960 Policy Statement were not intended to fix legal rights (App. A, *infra*, p. 22). The Commission, in issuing the Statement, also stressed its preliminary and non-binding character (24 F.P.C. 818, 819; cf. *id.* at 1014).

convenience and necessity, to require the refund of excessive amounts previously collected during the pendency of that application—at least, where it appears additionally that the authority to initiate service prior to permanent certification was stimulated by the producer's anxiety to commence deliveries to the pipeline and was accorded on his *ex parte* request without any notice to those most directly affected: the ultimate consumers of the gas.

Only recently, in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, this Court held that the Commission could compel the refund of charges collected under an in-line price which, on judicial review, was invalidated as unduly high. The Court stressed that until judicial review was completed the price was only provisional. That is equally the case here. The producers obtained authorization to charge the prices in issue on the basis of their *ex parte* representations. The authorization was strictly an interim measure. Each temporary certificate recited expressly that it did not constitute approval of any rate or charge. We submit that here, no less than in *Callery,* the Commission, when it determined that the provisional price had been unduly high, had the power and the duty to "undo what [was] wrongfully done by virtue of its order." 382 U.S. at 229.

It is not decisive, in our view, that the temporary certificate failed to give a more explicit warning to the producer that he might be required, as a condition of obtaining a permanent certificate, to refund charges

found to be excessive.[8] There was no such explicit warning in *Callery*. Nor, we stress, did the consumer interests have warning when the temporary certificates were issued *ex parte* at the producers' behest.

We acknowledge that the Commission should consider elements of justified producer reliance before ordering a refund. In the case of these very sales the producers pointed out to the Commission that they had paid certain royalties and State taxes computed on the basis of the temporary-certificate price which they could not now recoup and the Commission (in orders issued subsequently to the order under review here) decided to allow a deduction from the refund in order to reflect this factor (see App. C, *infra,* pp. 70–71). But it is one thing to say that in determining the measure of refund in a particular case equitable circumstances favoring the producer are entitled to weight; it is quite another to say that, however the equities on both

[8] In eight of the sales that were involved in the review proceeding in the court below, the temporary certificates had specified a refund obligation (see App. A, *infra,* p. 31, n. 33). Six of these, however, had been issued after the Commission's decision in *Skelly Oil Co.*, 28 F.P.C. 401, modified, 28 F.P.C. 1065 (this was the decision set aside by the District of Columbia Circuit in the *Skelly* case, *supra*). In *Skelly*, the Commission held, as a matter of policy, that it would not compel refunds where there was no express refund obligation in the temporary certificate. Thereafter, it specified such obligations in all instances (as here) where it had doubts that the guideline price would be the in-line price. Prior to *Skelly* the Commission's policy on the question of compelling refunds in the absence of a condition to that effect in the temporary certificate had not crystallized. Its practice had been not to include such conditions, except where it felt there were extraordinary circumstances (as in the other two temporary certificates here in which refund conditions were included).

sides balance out, the Commission is foreclosed from ever requiring any refund unless it has unequivocally forewarned the producer. Neither the language nor the purposes of the statute support so inflexible a limitation upon the discretion of the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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MARCH 1967.

does bolster [illegible] the Commission is foreclosed from ever reopening any refund unless it has unequivocally forewarned the producer. Neither the language nor the purposes of the statute support so [illegible] a limitation upon the discretion of the Commission.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

[illegible]

[illegible]

[illegible] S. [illegible]

[illegible]

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[illegible]

APPENDIX A

United States Court of Appeals, Tenth Circuit
NOVEMBER TERM, 1966

Nos. 7781, 8298, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 8358, 8359, 8360 and 8362

SUNRAY DX OIL COMPANY; SOHIO PETROLEUM COMPANY; THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY; THE BROOKLYN UNION GAS COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; LONG ISLAND LIGHTING COMPANY; TEXACO INC.; GULF OIL CORPORATION; SUN OIL COMPANY; EDWIN L. COX; LAMAR HUNT; HUMBLE OIL & REFINING COMPANY; AND UNION PRODUCING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

GULF OIL CORPORATION; HUMBLE OIL & REFINING COMPANY; TEXACO INC.; AND SUN OIL COMPANY, INTERVENORS IN NOS. 8311, 8312, 8313, AND 8314

On Petition To Review Orders of the Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge*: These petitions seek review of Opinion No. 422[1] of the Federal Power Commission granting permanent certificates of public convenience and necessity under § 7 of the Natural

[1] 31 FPC 623.

248-571—67——2

Gas Act[2] for sales of natural gas produced in Texas Railroad District No. 4 to various interstate pipeline companies. Nine of the petitions are by independent natural gas producers, three are by distributing companies selling gas in the Atlantic Seaboard area, and one is by the Public Service Commission of the State of New York. All the petitions are brought under § 19(b) of the Act.

The Commission fixed the rate at 16 cents per Mcf. The producers say that the rate is too low and the distributors say that it is too high. The parties are also at odds on the Commission treatment of the refund question. We affirm the 16-cent rate and hold that refunds of collections made in excess of that rate under temporary certificates containing no express refund condition may not be ordered.

The first petition for review was filed in the Tenth Circuit by Sunray DX Oil Company and other producers. After procedural skirmishes,[3] petitions for review of Opinion No. 422 pending in other circuits were transferred to the Tenth Circuit pursuant to 28 U.S.C. § 2112(a). The producers filed motions for leave to adduce additional evidence. These motions were deferred to the hearing of the petitions on the merits. The proceedings were held in abeyance for a time in anticipation of the decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223.

An understanding of the issues will be helped by a brief recitation of the Commission actions and the court decisions which make up the background. The decision in *Atlantic Refining Co.* v. *Public Service*

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[2] 15 U.S.C. §§ 717–717w.

[3] See *Amerada Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., 338 F. 2d 808; and *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 351 F. 2d 395.

Commission of New York, 360 U.S. 378 (CATCO), directed the Commission in certificate cases to keep initial prices in line. Thereafter, on September 28, 1960, the Commission promulgated its Statement of General Policy No. 61-1.[4] This was issued concurrently with Opinion No. 338 in *Phillips Petroleum Company.*[5] The Policy Statement established 23 rate areas, including District No. 4 involved herein, and with unimportant exceptions announced maximum rates for each area. In *Phillips,* the Commission held that the regulation of independent producers under the Act could be accomplished more appropriately by the establishment of area rates than by the establishment of producer rates on individual cost-of-service findings.[6] The Policy Statement established a guideline initial rate for District No. 4 of 18 cents per Mcf.

On August 30, 1962, the Commission issued Opinion No. 362 in *Skelly Oil Co.,* 28 FPC 401. That proceeding involved applications under § 7 for permanent certificates covering sales of gas produced in District No. 4. Therein the Commission disposed of all applications under contracts executed prior to September 28, 1960, the date of the Policy Statement, by the imposition of a 15-cent initial price condition and deferred decision on sales under four contracts bearing a later date. On the same day as the *Skelly* decision, the Commission promulgated its Fifth Amendment to the Statement of General Policy No. 61-1, 28 FPC 441, reducing the guideline initial rate in District No. 4

[4] 24 FPC 818.

[5] 24 FPC 537, affirmed D.C. Cir., 303 F. 2d 380, 373 U.S. 294.

[6] The first area rate proceeding was initiated by Commission order dated December 23, 1960, 24 FPC 1121, and culminated in Opinions Nos. 468 and 468-A filed in August and October, 1965, and now under review in this court. See *Skelly Oil Company* v. *Federal Power Commission,* No. 8385, and companion cases.

from 18 cents to 16 cents effective the same date. The four applications which had been severed from *Skelly* were then consolidated with a number of applications covering District No. 4 sales under contracts made between September 30, 1960, the date of the Policy Statement, and August 30, 1962, the date of the *Skelly* decision and the Fifth Amendment. The consolidated proceedings went forward under the style *Amerada Petroleum Corporation, et al.*, Docket Nos. C162 etc.

In its order for the consolidated hearing the Commission stated:

> In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15-cent per MCF price which we found to be the in-line price as of September 28, 1960, the 16-cent price which is being adopted as the future area ceiling price for this area, or the 18-cent per Mcf price established on September 28, 1960.

The applications covered initial contract-based rates from 15.9 cents to 19.8 cents.[7] During the pendency of their applications for permanent certificates, numerous producers requested and received temporary authorizations under § 7(c) of the Act and § 157.28 of the Commission regulations thereunder.[8] These were issued *ex parte* and without notice or hearing. Many of the temporary certificates did not contain an express refund condition.

The *Amerada* proceedings before the Examiner went forward contemporaneously with the judicial review of the *Skelly* decision, Opinion No. 362. In *Amerada*

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[7] There was only one proposed price at 19.8 cents. The next highest was 18 cents. The proponent of the 19.8-cent price is not seeking review of the Commission action.

[8] 18 C.F.R. 157.28.

the producers offered, and the Examiner declined to receive, testimony and exhibits covering economic and financial requirements. Texaco Inc. sought to obtain the disclosure and production of Commission records pertaining to the establishment of the guideline initial prices in the Policy Statement and the Fifth Amendment. This was denied. Review of the Commission actions upholding the Examiner on these two evidentiary issues was sought and denied in *Texaco Inc.* v. *Federal Power Commission,* D.C. Cir., 329 F. 2d 223, certiorari denied 375 U.S. 941, on the ground that under § 19 the petitions for review were premature.

A Commission staff economist presented, and the Examiner received in evidence, Exhibit 16. This exhibit is a summary of price and other information for all District No. 4 contracts dated 1955 or later, filed as rate schedules with the Commission, and calling for a price of at least 14 cents.[9]

The Examiner's decision, issued July 23, 1963, recommended the grant of permanent certificates of public convenience and necessity to all producer applicants on specified conditions, two of which are pertinent here. The initial price was to be no greater than 15 cents per Mcf and no refunds were required of producers selling gas under temporary authorizations which did not contain any specific refund condition. Both the producers and the distributors filed exceptions to the Examiner's decision.

While the matter was pending before the Commission, the District of Columbia Circuit decided the *Skelly* case.[10] That decision affirmed the 15 cent in-

[9] The witness said that he excluded sales below 14 cents because "the 14 cent level is the lower suspension level of Commission Policy Statement 61-1."

[10] *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, certiorari denied *sub nom. Pardo Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963.

line price established by Opinion No. 362 for District No. 4 sales under contracts made before September 28, 1960, and reversed the Commission holding that refunds could not be required when the temporary authorization contained no express refund condition.

By its Opinion No. 422, here under review, the Commission upset the Examiner on both the price and refund issues. It fixed the in-line price at 16 cents per Mcf and deferred the question of refunds under contracts having no express refund conditions.

With this background we first consider the rejection of the proffered evidence. Several producers jointly tendered testimony and exhibits covering economic and geologic factors pertinent to the area. The showing was that exploratory and drilling costs have substantially increased between the time when the majority of contracts in *Skelly* had been executed and the execution of the contracts with the prices here in dispute; that the public interest required further exploratory and drilling efforts in the area because of increasing demand and lessening supply; and that the public convenience and necessity required initial contract prices up to and including 18 cents per Mcf. The Commission upheld the Examiner's decision to exclude the evidence because it was not relevant to a § 7 proceeding where the test is public convenience and necessity rather than the determination of a just and reasonable rate.

CATCO[11] holds that the Act does not require a determination of just and reasonable rates in a § 7 proceeding; that if a proposed price is "out of line" the Commission may impose conditions; and that to protect the public interest the Commission acts in a § 7

[11] 360 U.S. 378, 390–392.

proceeding "to hold the line awaiting adjudication of a just and reasonable rate." *CATCO* does not define the "line" and does not fix standards by which a determination may be made of whether a price is "in line" or "out of line."

In *Callery* the Supreme Court said that under § 7 "adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." [12] With reference to cost and economic trend evidence, the Court mentioned the experience of the Commission, said that the Commission "properly and constructively exercised its discretion in declining to consider this large quantity of evidence," and concluded that the rejection of such evidence is "an appropriate step" in the streamlining of Commission procedures.[13]

The producers seek to avoid the impact of *Callery* by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither *CATCO* nor *Callery* establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity. We do not say that economic and geologic evidence is never admissible in a § 7 proceeding. This may depend on varying circumstances. All we say is that in the posture of this case the Commission did not abuse its discretion by rejecting the evidence.[14]

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[12] 382 U.S. 223, 227.

[13] *Id.* at 228, note 3.

[14] See *Public Service Commission of the State of New York v. Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 246-247.

By request to the Examiner and by application for a subpoena duces tecum and ad testificandum, Texaco Inc. sought to obtain the disclosure of the data and materials underlying and supporting the price levels for initial sales in District No. 4 as announced by the Commission in its Policy Statement and in the Fifth Amendment thereto. In sustaining the Examiner's denial, the Commission pointed out that the burden is on a producer-applicant to prove that a certificate is required by the public convenience and necessity; that the effect of the Texaco motion is to place on the Commission the burden of justifying the price expressed in the Policy Statement; and that Texaco had demonstrated no reason for the production of the documents and issuance of a subpoena as requested. Consideration of this problem is entwined with the intent and effect of the Policy Statement.

We have noted that the Policy Statement fixed an 18-cent price, that *Skelly,* Opinion No. 362, fixed a 15-cent price for the period prior to the issuance of the Policy Statement, that the Fifth Amendment to the Policy Statement fixed a 16-cent price, and that we are here concerned with contracts executed between the date of the Policy Statement and the date of the Fifth Amendment. The producers argue that the Policy Statement established an 18 cent in-line rate. The distributors contend that *Skelly* established a 15 cent in-line rate. None of the petitioners are happy with the 16-cent rate which the Commission decreed.

The basic claim of the producers is that the Policy Statement set in-line prices on which they were entitled to rely. In our view this is a misconception of the Commission action. The Policy Statement is just what it purports to be—an ex parte statement issued without hearing by an agency to advise the public properly of the manner in which the agency

proposes to exercise a discretionary power. Reference is made therein to "price standards" and "price levels." The purpose is that of "guidance and initial action by the Commission." The effect is that, "in the absence of compelling evidence calling for other action," producer applications for certificates proposing higher rates than those listed will be either denied or conditioned. The result is that the Policy Statement plays a "significant role" in arresting the upward trend of producer prices.[15]

The announcement of a guide to price levels or price standards is not the establishment of an in-line price. That is accomplished after notice and hearing in an appropriate proceeding—not in a policy declaration. No doubt designedly, the Commission did not specify the formula which it used in arriving at the guideline rates. Its failure to do so may put a burden on producers and distributors alike in any attempt to show that a guideline price should or should not be adopted as an in-line price. The presence of such burden neither requires nor permits a party to go back of the Policy Statement in search of its justification. That is the administrative concern of the Commission. It follows that the request and application of Texaco for the underlying data and materials were properly denied.

The Commission may not rigidly and arbitrarily impose a guideline price as an in-line price. The Policy Statement recognizes that compelling evidence may call for action other than granting a certificate at the guideline price. The point is that, in the context of the proceedings before us, the establishment in 1960 of the 18-cent guideline cannot be ignored by the Commission in arriving at the in-line

[15] *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 312–313.

price.[16] Its effect had to be, and was, evaluated by the Commission.

The other extreme of the dispute is the position of the distributors who say that the 15-cent price established in *Skelly,* Opinion No. 362, for contracts executed prior to the date of the Policy Statement is the in-line rate which is presumed to continue until a just and reasonable rate has been determined in an area rate proceeding.[17] We agree with the distributors that the in-line procedure is an interim device and is not intended to be a permanent method of producer regulation. It is a necessary device because of the complex and time-consuming processes incidental to the establishment of a just and reasonable rate.[18] The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.

The Commission has recognized that the in-line price must reflect current conditions.[19] The Courts

[16] In *Public Service Commission of the State of New York v. Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 247, the court said: "The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion."

[17] The just and reasonable rate for the sales certificated by the Commission in the order under review will be fixed in the *Texas Gulf Coast Area Rate Proceeding*, AR64-2, now in hearing before a Commission Examiner.

[18] The *Permian Basin Area Rate* case was before the Commission for nearly five years. See *supra* note 6.

[19] See Opinion No. 362, *Skelly Oil Company*, 28 FPC 401, 408; Opinion No. 412, *Hassie Hunt Trust*, 30 FPC 1438, 1442; Opinion No. 436, *Union Texas Petroleum*, 32 FPC 254, 260.

of Appeals have agreed.[20] Further support is found in the *Callery* decision where the Supreme Court referred to "other contemporaneous certificates" and "prices higher than existing levels."[21] We concur with the Commission that once the in-line price is established it is presumed to continue not until the just and reasonable rate is determined but until "substantial evidence is presented that it has changed."[22]

Thus we reach the heart of the Commission's decision. The question is whether substantial evidence sustains the 16-cent price. All the petitioners say that it does not.

The basis for the Commission's action is Staff Exhibit No. 16 which lists the provisions of gas sales in District No. 4 "dated 1955 and later with total rates of 14.0¢ Mcf and higher as accepted for filing by the Federal Power Commission as of 8–31–62." The Commission analyzed the figures presented and compared the initial contract prices for the two years here under consideration with those pertinent to the *Skelly* proceeding where the 15-cent price was fixed for sales contracted before the date of the Policy Statement. It found that in the later period 82% of the gas moving in interstate commerce was at initial contract prices of 16 cents per Mcf and higher, and that the weighted average price for the period was 17.176 cents per Mcf. For the earlier period the weighted average

[20] In *United Gas Improvement Co.* v. *Federal Power Commission*, 9 Cir., 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, the Court said: "As previously indicated the price line is intended to reflect current conditions in the industry." See also *Sohio Petroleum Company* v. *Federal Power Commission*, 10 Cir., 298 F. 2d 465, 467; and *Atlantic Refining Company* v. *Federal Power Commission*, D.C. Cir., 316 F. 2d 677, 680.

[21] 382 U.S. 223, 227.

[22] *Superior Oil Co.*, Opinion No. 437, 32 FPC 241, 243.

was 16.5 cents. This shows an increase of more than six-tenths of a cent for the later period. The Commission pointed out that the lowest selling price for substantial quantities of gas during the period in question was 16 cents and concluded that the public convenience and necessity required the issuance of the certificates at that price.

The distributors argue that the Commission considered and acted on suspect prices. *United Gas Improvement Co.* v. *Federal Power Commission*, 9 Cir., 283 F. 2d 817, 824, holds that it is an abuse of discretion for the Commission, in establishing a price line, to rely upon producer prices which are under review in pending court and Commission proceedings. In that case and the decisions of the Courts of Appeals which followed it[22] there were both numerous uncontested contracts available for consideration and certificates which the courts had rejected because of their issuance at excessive price levels.

The Examiner limited his consideration to sales under contracts which were made during the pertinent period and for which permanent certificates had been issued. The Commission found that the effect of this limitation was to arrive at an in-line price on the basis of only 1.39% of the volumes for all sales shown. In the *UGI* decision of the Ninth Circuit, mentioned above, the court said that the

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[22] See *United Gas Improvement Co.* v. *Federal Power Commission*, 5 Cir., 290 F. 2d 147, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965; *Public Service Commission of New York* v. *Federal Power Commission*, D.C. Cir., 287 F. 2d 146, certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880; *United Gas Improvement Company* v. *Federal Power Commission*, 10 Cir., 287 F. 2d 159; and *California Oil Co., Western Div.* v. *Federal Power Commission*, 10 Cir., 315 F. 2d 652.

line "may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce."[24]

Thus we have here a situation vastly different from that presented in the cases which have dealt with the suspect price doctrine. Exhibit 16 included the sales under consideration in the very proceedings in which the exhibit was presented. The distributors say that this is an impermissible bootstrap procedure. The producers in turn say that the reason for the small percentage of sales free from attack is the action of the distributors in contesting all sales above the price which is acceptable to the distributors.

In the determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. At the same time, when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries. In fixing the 15-cent price for District No. 4 sales which preceded the Policy Statement, the Commission in *Skelly* gave a "limited degree of consideration"[25] to the price range of contracts resulting in temporary certificates although it recognized that they were not "as persuasive"[26] as permanent certificates. The price fixed in *Skelly* was upheld by the District of Columbia Court of Appeals which commented that the Commission gave "less consideration" to the temporary certificates than it did to the permanents.[27]

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[24] 283 F. 2d 817, 823.

[25] 28 FPC 1065, 1068.

[26] 28 FPC 401, 409.

[27] *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, 245-246.

An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the "suspect price" doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the "unreviewable fiat" of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates.

The producers say that the in-line price for permanent certificates should be the highest price at which substantial quantities of gas move in interstate commerce and that here the Commission has fixed the lowest rather than the highest price.[28] The producers rely on the statement in *Callery* that:[29] "We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." This language does not mean that the public interest is not protected if the sales are approved at less than existing levels.

The distributors point to the decision in *Atlantic Refining Co.* v. *Federal Power Commission,* D.C. Cir., 316 F. 2d 677, 679, which says that "if the Commission is to err in setting an initial rate, it should err on the low side" because of the right of a producer to file immediately for a rate increase under § 4.

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[28] The opinion of the Commission says: "The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf." 31 FPC 623, 637.

[29] 382 U.S. 223, 227.

From this premise they argue that the 15-cent price of *Skelly* should have been adopted. The provisions of § 4, although they may not be disregarded, are not a complete answer. Rate increases filed thereunder are subject to suspension. The producers may have the use of the money collected but it is at interest if refunds are ordered and royalty and tax payments have to be made on the total amount collected. If the just and reasonable rate as finally determined is greater than the in-line rate adopted, the producers have no way of recouping their losses.[30] Our view is that the possibility of filings for increased rates under § 4 does not require that the Commission fix the price in a § 7 proceeding at a figure lower than that at which substantial volumes of gas are currently contracted for sale in interstate commerce.

Both producers and distributors attack the 16-cent price on the ground that it results from an improper use of, and reliance on, agency expertise. For over 12 years since the decision in *Phillips Petroleum Company* vs. *Wisconsin,* 347 U.S. 672, the Commission has been struggling to regulate the independent natural gas producers under an act which is not well designed for the attainment of that objective. Serious administrative problems have developed. Procedures and methods have changed from time to time. Whether those now in use will receive full judicial approval remains to be seen. In the economic regulation with which the Commission is concerned the experience of the past must be projected into the future. The importance of expertise may not be

[30] An example is found in the pending *Permian Basin Area Rate* proceedings. The Policy Statement fixed the guideline price at 16 cents but the just and reasonable rate for new gas sold under contracts dated after January 1, 1961, was fixed at 16.5 cents.

downgraded. A delicate balance must be maintained between producer and consumer interests if the continued life of the industry is to be assured.

We have noted that an in-line price continues until substantial evidence shows a change. The producers point out that the Commission controls the variables which would result in a change by rejecting evidence both of producers' costs and of initial prices which it considers suspect. The potential for circuity of action does not impress us too much. The cost evidence has been refused because it goes to the just and reasonable rate issue. In a § 7 proceeding the test is public convenience and necessity and evidence relevant thereto should be received. In the applications before us this evidence, in large measure, has taken the form of a showing of contract-determined initial prices. The Commission has given consideration to prices under temporary authorizations and under permanent certificates. Greater weight has been given to the permanent than to the temporary certificates. Some prices have been discounted as too high and some as too low. We believe this is proper. Here, at least, the result reached has not come from the use of a crooked yardstick.

The analysis and use of field prices established by producer-pipeline contracts require expertise. Objections to the use of weighted averages are not well taken. Such averages are necessarily lower than the highest prices paid. At the same time nothing is wrong with the use of weighted averages to compare price levels. Here the Commission has made such comparisons. These are proper as long as the action is not capricious or arbitrary.

It is apparent that in the case at bar the Commission was confronted with a difficult situation. *CATCO* tells it to hold the line. The Ninth Circuit

UGI decision[31] says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."[32] We find no abuse of discretion and affirm the 16-cent price.

The path from the morass of in-line prices leads directly to the thicket of refunds. Here again the traveled way is not well marked and we have a three-way disagreement among the parties over the route to be followed.

In the consolidated proceedings before the Commission, 27 of the 35 dockets related to applications in which temporary certificates had been issued without any express refund condition.[33] The Examiner

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[31] 283 F. 2d 817.

[32] *People of the State of California* v. *Federal Power Commission*, 9 Cir., 353 F. 2d 16, 23. See also *Charleston & Western Carolina Railway Company* v. *Federal Power Commission*, D.C. Cir., 234 F. 2d 62, 64.

[33] In the remaining 8 applications a typical authorization is conditioned upon the refund to purchasers of "any amounts collected plus interest at 7 percent per annum in excess of 15.0 cents per Mcf which may be determined to be in excess of the price required by the public convenience and necessity."

held that on the authority of Opinion No. 362, *Skelly*, he had no power to order refunds when the temporary certificate did not contain an express refund provision. While the proceedings were pending before the Commission on exceptions, the District of Columbia Circuit reversed the pertient holding in Opinion No. 362.[34] On the authority of that decision the Commission reversed the Examiner on the refund issue and held that "the public interest would best be served by deferring for the present the decision whether refunds should be ordered * * *, and if so, the extent of such refunds." The Commission said that the parties "will be given an opportunity to submit further briefs on the issue of refunds."

At the outset we are met by the Commission argument that the refund issue is not now reviewable because § 19(b) makes aggrievement a jurisdictional prerequisite to review of Commission orders and here aggrievement is absent because no refunds have been required. In denying the Commission motion to dismiss the *Sunray* petition[35] we held that Sunray was likely to suffer injury by the determination of the inline price and that the threat of refunds made it an aggrieved party.

The threat has been followed by action. On July 27, 1966, the Commission issued Opinion No. 501 in the *Amerada* consolidated dockets which were con-

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[34] *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963.

[35] *Sunray DX Oil Company* v. *Federal Power Commission*, 10 Cir., 351 F. 2d 395, 400. The position of *Sunray* is important because all other petitions to review are transfers from other circuits.

sidered in Opinion No. 422 here under review.[36] Opinion No. 501 says that the producers therein listed "will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates" with the exception of certain royalty and tax payments not pertinent here. The producers listed include Sunray and six others who are petitioners in these proceedings. They are required to report their excess collections and hold them subject to the further order of the Commission "directing the disposition of those amounts."

Opinion No. 422 as implemented by Opinion No. 501 adversely affects Sunray and the other six producers. Although payment itself is not yet required, the producers are told that the excess collections do not belong to them. The only thing which remains to be decided is the question of who gets the money and under what conditions. This is not a case like either *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 5 Cir., 357 F. 2d 232, or *United Fuel Gas Company* v. *Federal Power Commission,* 4 Cir., —— F. 2d ——. They related to an order directing that refunds generated by a settlement agreement be retained by the producer pending Com-

[36] This opinion was called to our attention during the argument of the *South Louisiana* cases, our Docket Nos. 7912, etc., *Pan American Petroleum Corporation, et al.* v. *Federal Power Commission.* We also have pending before us Docket No. 9000—*Skelly Oil Company* v. *Federal Power Commission*—which seeks review of Commission Opinion No. 492. A court may take judicial notice of its own records. *Dial* v. *Johnson,* D.C. Cir., 259 F. 2d 189, 190. Although Opinions Nos. 492 and 501 were issued after the case at bar had been argued orally and submitted for decision, they are not controverted and the demands of justice require that we notice them. See *Ellis* v. *Cates,* 4 Cir., 178 F. 2d 791, 793, certiorari denied, 339 U.S. 964.

mission inquiry into whether release of the refunds to the pipelines would be proper. There the obligation to refund was fixed by the settlement. Here the obligation to refund is fixed by a Commission order. A producer has a right to a prompt determination of its liability. We believe that the question of the power of the Commission to order refunds of amounts collected under temporary certificates containing no express refund condition is ripe for determination and that proper judicial administration requires that it be deferred no longer.

Temporary certificates are issued ex parte and without hearing under § 7(c) of the Act in accordance with Commission Regulation § 157.28(c).[37] A party aggrieved by the issuance of such certificate has the right to judicial review.[38] The first attack on the absence of an express refund condition in the temporaries here under consideration came when the distributors, during the pendency of the proceedings before the Examiner, moved for the termination of the temporaries or in the alternative for a floorless refund condition. The Commission denied the motion. It declined to impose the refund condition because "we think clearly this would not be a proper action for us to take here." It further said that such action "would so denature the value of a commission authorization as to place any reliance upon our actions in this area in serious jeopardy" and that "we find it would be contrary to the public interest, as well as inequitable, to condition the temporary cer-

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[37] 18 C.F.R. § 157.28(c). *Public Service Commission of the State of New York* v. *Federal Power Commission*, D.C. Cir., 327 F. 2d 893, 896, upholds the applicability of § 7(c) to independent producers and the validity of the regulation.

[38] *Id.* at 895. The Court there held that the New York Public Service Commission had the right to petition for the review of an order granting a temporary certificate.

tificates" as requested by the distributors. The distributors did not seek review. We do not accept the producers' view that the unreviewed denial of the motion irrevocably determined the refund issue. The Commission could change its mind. At the same time the reasons given for the action are most compelling and show mature consideration of the problem.

The distributors emphasize the importance of refunds to the protection of the consumer interests. This may be conceded to the extent that refunds are passed down to the ultimate user. These benefits must be weighed against the desirability of the maintenance of an adequate supply of gas. A repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers. We will not speculate on the effect of such repricing on their exploration and development activities. The benefits derived from such costly activities may or may not be of greater value, from the public standpoint, than the few dollars recovered by the home consumer. Perhaps he would rather have an assured supply for his expensive appliances than a modest refund. In any event the record does not purport to cover such issues and we turn to the decisions which the parties say control the outcome.

In our opinion the *Callery* decision[39] does not dispose of the issue presented here. The Supreme Court was there concerned with South Louisiana prices which had been the subject of much litigation.[40] The Court recognized that the Commission may not make

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[39] *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

[40] See *CATCO*, 360 U.S. 378, and *Public Service Commission of the State of New York* v. *Federal Power Commission*, 361 U.S. 195, reversing 269 F. 2d 865. See also cases cited *supra* note 23.

reparation orders but said that "it is not so restricted where its order, which never became final, has been overturned by a reviewing court" and that "judicial review at times results in the return of benefits received under the upset administrative order."[41] The situation here is different. This is the first judicial review of the prices under consideration and we uphold the Commission on its in-line rate.

In *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 10 Cir., 270 F. 2d 404,[42] Sunray applied for temporary authority which was granted on the condition that an undertaking be filed "to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity." We pointed out that Sunray was required "to speculate" as to what the rate might be and was denied "its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part."[43]

We have noted that Commission Opinion No. 362 pertaining to District No. 4 sales made under contracts executed prior to September 28, 1960, was set aside by the District of Columbia Circuit on the refund issue.[44] The Court there held that the "power [to order re-

[41] 382 U.S. 223, at 229.

[42] The *Sunray Mid-Continent* case considered two consolidated petitions for review. We are here concerned with No. 6061.

[43] 270 F. 2d 404, at 408–410.

[44] The Supreme Court denied certiorari to review the District of Columbia Circuit decision. See *Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963. Denial of certiorari "imports no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U.S. 482, 490, and *Pan American Petroleum Corp.* v. *Federal Power Commission*, 10 Cir., 352 F. 2d 241, 243.

funds] does not depend upon an explicit refund provision in a temporary certificate."[45] The Court went on to say that the exercise of the power was not "mandatory" and that the "refund issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates."[46]

The Court quoted the general language of the temporary certificates[47] that "acceptance for filing shall not be construed as constituting approval of any rate" and that authorization and acceptance of the rate schedule "are without prejudice to such final disposition of the certificate application as the record may require." It then concluded that "all else aside" these provisions authorize the conditioning of a permanent certificate by a refund requirement.

In our opinion these provisions mean that the Commission is not binding itself, by the issuance of a temporary certificate, to issue an identical permanent certificate of prospective effect after a hearing.[48] In its denial of the distributors' motion for refund con-

[45] 329 F. 2d 242, at 249.

[46] *Id.* at 250.

[47] This language is quoted in 329 F. 2d 242, at 249 and is the same as that found in the temporary certificates which are in the record before us and which do not contain express refund conditions.

[48] Included in the dockets considered by the Commission in this consolidated proceeding was No. C162–276 in which a temporary certificate was issued to, but not accepted by, Sun. It contained a definite refund obligation covering collections at a rate above 15 cents per Mcf and the provision that: "This temporary certificate and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require." The inclusion of this routine language could not mean that the explicitly floored refund obligation became floorless.

ditions the Commission gave no recognition or effect to such provisions. We believe that the Commission intended the routine, boiler-plate language to have a purpose entirely different from that of an express refund condition.

When a producer dedicates its gas to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval."[49] If the language mentioned means that a producer accepting such certificate without express refund conditions dedicates its gas without any floor on the rate, the producers have taken many uncalculated and uncalculable risks. We suggest that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance.

The situation in the case at bar differs from that presented to the District of Columbia Circuit. The proceedings there involved § 7 applications for permanent certificates covering District No. 4 sales under contracts executed before the issuance of the Policy Statement. Here we are concerned with sales under contracts made between the date of the Policy Statement and the date of the Fifth Amendment. For that period the guideline initial rate was 18 cents. The temporary certificates with which we are concerned were issued "at prices not exceeding 18¢ per Mcf."[50] The 18-cent figure is significant and meaningful.[51] It resulted from the exercise of Commission expertise. When the producers dedicated their gas under temporary certificates permitting the collection of prices up

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[49] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156. See also § 7(b) of the Act.

[50] See Opinion No. 501.

[51] See *Sohio Petroleum Company* v. *Federal Power Commission*, 10 Cir., 298 F. 2d 465, 468.

to 18 cents without express refund obligation, they were entitled to rely on them. They were entitled to rely on the prior decisions of the Commission declining to order refunds of collections under unconditionally authorized temporary certificates.[52] For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate. We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed so that it may make an intelligent decision whether to accept or reject the certificate. Such was our holding in *Sunray Mid-Continent* and we adhere to it. In our opinion, absent the special considerations recognized in *Callery,* refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

The motions to adduce additional evidence are severally denied. The cases are all remanded for further proceedings consistent with this opinion.

SETH, *Circuit Judge,* dissenting in part: I respectfully dissent on the issue of the "in-line" price because the Commission, in its determination of this issue in the consolidated cases here on review, has adopted a new concept of "in-line" which constitutes too wide a departure from prior usage and practice and from the authorities to be approved.

The Commission has here divided the range of prices into several segments, and has announced that the price here to be certificated is the lowest seg-

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[52] See dissenting opinions of Commissioner O'Connor in Opinions Nos. 492 and 498.

ment, "* * * the lowest price at which substantial volumes of new gas were sold in interstate commerce * * * ." The Commission is very candid in its selection of this lowest price. Its findings and its comments on the evidence show that a higher price would otherwise follow. For example, the Commission stated that the evidence "* * * points in the direction of a higher price * * * ," than 16 cents which was the price here adopted. The Commission also said: "Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed."

The Commission also found that only a price above 18 cents "* * * would have an adverse impact on the pricing structure in the area."

The selection of the lowest segment is explained by the Commission in its opinion where it states: "In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications."

To provide some factual material on this particular issue, reference should be made to the evidence upon which the Commission placed its principal reliance, if not its sole reliance. This consisted of the following:

1. The Commission's Statement of General Policy No. 61-1, September 28, 1960, 24 F.P.C. 818, announcing an 18 cent guideline price.

2. The Fifth Amendment to Statement of General Policy No. 61-1, August 30, 1962, 28 F.P.C. 441.

3. Staff Exhibit No. 16, admitted at the hearing, which consisted of a summary of field prices under

contracts executed between January 1, 1955, and August 31, 1962, for sales in Texas Railroad Commission District No. 4 on file with the Commission and having a total initial rate of 14 cents per M.c.f. This exhibit included permanent certificates, temporary certificates, and the sales which were in issue in the consolidated proceedings.

Of the above several exhibits, the Commission considered Staff Exhibit No. 16 as the most important. The opinion of the Commission with reference to this exhibit, and to the period in issue, shows the following:

1. The weighted average price by volume was above 17.178 cents.

2. Eighty-two per cent of the gas sold was at 16.0 cents *and above.*

3. Seventy-one per cent of the gas was being sold at 17.0 cents *and higher.*

4. The table in the Commission's opinion with reference to this Exhibit also shows that twenty-seven per cent of the gas was sold at 16 cents *and below* and twenty-eight per cent at 16.5 cents *and below.*

The Commission found that 16 cents was the "in-line" price and stated, as referred to above, "* * * the record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area in the period in question was 16 cents per M.c.f."

The use in the text of the opinion of the term "and above" in the finding that eighty-two per cent of the gas passed at 16 cents and above appears to be somewhat unusual in view of the Commission's selection of the lowest price. It would appear that the reference to percentages or quantities of gas would instead include the amounts which passed at a figure of 16 cents or less. The opinion itself shows that some ten per

cent of the gas was sold *at 16 cents,* some eleven per cent of the gas was sold at 16 cents to 16.5 cents, inclusive, and twenty-seven per cent at 16 cents *and below.*

As stated above, it is however not necessary to demonstrate by the figures that the Commission selected the lowest segment by reason of their recitation that they were so doing. In this consideration it should also be borne in mind that the Commission also found that there would be no adverse impact on the pricing structure in the area except by a price above 18 cents.

There would seem to be no question but what an "in-line" price is to be determined on the basis of contemporaneous certificates as stated by the Supreme Court, and on contemporaneous contracts where necessary. This price must represent the prevailing current conditions as the Commission states in its opinion. *United Gas Improvement Co.* v. *Federal Power Comm'n,* 283 F. 2d 817 (9th Cir.). The Supreme Court has clearly stated that the "in-line" price is a device which will prevent gas from entering the interstate market " * * * at prices higher than the existing levels * * *."; and "* * * consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect.' " *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223. Also "where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in the triggering of general price rises * * *." *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378.

The Commission in its determination of the "in-line" price in this case by an adoption of the lowest

price departed from the "current conditions test," and the "existing levels test," referred to by the Supreme Court. This departure represents a basic change in policy, and is not just a difference in what quantity may constitute a "substantial quantity." The Commission did not base its decision on such a distinction. It clearly and candidly selected the lowest segment of the price range. The Supreme Court in its references to current conditions can only mean the prevailing of predominant conditions existing in the area and cannot mean the lowest or the highest of the prices, for such are not typical or prevailing prices. In common usage something "in-line" is in conformance with other persons or things; it is, to borrow a phrase from the civil rights vocabulary, "in the mainstream"; it is a "prevailing price," a "going rate." It is not of the extreme in any direction, it is not the widest, the longest, the lowest, or the highest.

The Commission properly used the permanently certificated prices, and the temporary certificates prices, including the prices in issue here. I agree with the majority that these contracts or prices elsewhere referred to as "suspect" must be used in this case. They must be used for all purposes. This was the only data available for a realistic consideration of the issues, the economic data of the petitioners having been excluded. The Commission considered all the certificates in order that it could have before it a "substantial quantity" of gas. It rejected the examiner's limited consideration with the following language:

> Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the "in-line" price amount to only 1.39 per cent of the volumes for all sales shown and to no more than 2.05 per-

> cent of the sales permanently certificated in the District contained in the exhibit.

and

> * * * In such circumstances it can hardly be maintained that the "in-line" test of the "prices under which a substantial amount of natural gas presently moves in interstate commerce" has been fully met by the examiner. In our opinion it would be manifestly improper to base an "in-line" price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets.

Thus all were considered to attain a sufficient volume, and the Commission did not and could not then disregard the temporary certificates on the price issue. Nor did the Commission state in its opinion that the temporary certificates were to be given less weight in its determination in this case. There is also no indication that they were given less weight other than the arguments in the briefs. The Opinion of the Commission in its explanation as to why the temporary certificates should be considered referred to its *Texaco Seaboard* case, 29 F.P.C. 593, where it said permanent certificates are decidely more persuasive than are temporary, but continued "* * * this does not thereby render temporary authorizations *per se* inadmissible." The Commission then said:

> The soundness of this principle is readily apparent when viewed in the light of the facts before us, where, absent the ability to consider these authorizations, we would not be basing our decision upon "substantial volumes of gas moving in interstate commerce."

The Commission then refers to the examiner's consideration quoted above. These references are only to *what* should be examined.

Thus the Commission considered the very large proportion of gas passing under temporary certificates, but did not state that this should receive less consideration or be given less weight than that permanently certificated. The Commission only stated:

> We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the "in-line" price for this period. Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the "in-line" level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed.

Thus from what is said in the Opinion, it cannot be concluded that the Commission has given less weight to the prices in the temporary certificates. With the minute percentage of the volumes considered being permanently certified, it would indeed require that the temporary certificates be virtually disregarded to explain a 16 cent price, and there is no indication that the Commission did so.

The Supreme Court has repeatedly said that the prices added as conditions to certificates under Section 7 do not constitute initial pricing by the Commission. *Federal Power Comm'n v. Hunt,* 376 U.S. 515. Thus the Commission is to set a price in the public interest and in line with current conditions

in the area, not what the Commission thinks is just and reasonable or to be on the "safe side," one way or the other, for that would clearly be initial pricing. The selection here by the Commission of the "lowest price" by the exercise of its expertise is initial pricing because it is not and does not purport to represent "current conditions."

This error by the Commission is one of law. It is the erroneous application of the standards set by the Supreme Court for the determination of "in-line" prices.

It would seem to be unnecessary to dwell on the importance of the Commission's determination of "in-line" prices; as the delays which are necessarily inherent in their determination and in any subsequent determination of just and reasonable rates are obvious. The period under consideration in these consolidated cases begins in 1960, and the case concerns certificates covering some 31,500,000 M.c.f. per year. It is apparent that the prices so established will remain in effect for many years, and consequently large quantities of gas will be sold under any determination of "in-line" prices by the Commission. The Supreme Court, in *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378, referred to the "inordinate delay presently existing in the processing of § 5 proceedings, * * * " and again in the same case to " * * * the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears well nigh interminable." These prices have in reality become more than a mere interim device, especially when coupled with moratoriums which may be imposed by the Commission.

Thus the importance of the "in-line" determination of the price additive to public convenience and necessity becomes all the greater. The Commission's

methods and the evidence used to support its findings must be more closely scrutinized.

Thus I would conclude that the Commission committed an error in law in applying the wrong standards for its determination of 16 cents as the "in-line" price in this case. This was selected, as the Commission states, as the lowest price, and I would remand the case for a determination not of the lowest price and not of the highest price, but of the "in-line" price.

On a somewhat different point I also disagree with the majority. Reference is made in the majority opinion to *Superior Oil Co.,* Opinion No. 437, 32 F.P.C. 241, and there is adopted a rule that the "in-line" price once established is presumed to continue until "substantial evidence is presented that it has changed." If this means that some sort of a presumption attaches to prior "in-line" prices which must be overcome, I disagree.

The authorities demonstrate clearly that the "in-line" price is to be determined on the basis of contemporaneous certificates, contracts, and price data. This necessarily contemplates the possibility of change from time to time in either direction. *Sohio Petroleum Co.* v. *Federal Power Comm'n,* 298 F. 2d 465 (10th Cir.). Once an "in-line" price is established, it continues for those bound until *formally* changed but this does not necessarily mean that a presumption attaches to a previous "in-line" price which must be overcome by any greater weight of evidence than would be required had no "in-line" price been established. There is no basis in the statutes for a presumption or continuing weight to be given to a prior determination in another proceeding. By definition the "in-line" price is what then prevails and not what has prevailed in the past nor influenced

by what has prevailed in the past. Whether the change is large or small should of itself make no difference in the determination; the changes from time to time should freely come about, based upon conditions as they may then exist.

APPENDIX B

I

United States Court of Appeals, Tenth Circuit

No. 7781

SEPTEMBER TERM, 1964

AMERADA PETROLEUM CORPORATION, SUNRAY DX OIL COMPANY, TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION, UNION PRODUCING COMPANY, JAKE L. HAMON, GEORGE H. COATES, EDWIN L. COX AND LAMAR HUNT, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT.

On Petition To Review Order of Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge:* This is a joint petition of six corporations and four individuals to review the respondent Commission's Opinion 422 and order of March 23, 1964, as affirmed on rehearing by Opinion 422-A and order issued May 27, 1964. The petitioners are all natural-gas companies within the meaning of the Natural Gas Act of 1938, as amended.[1] The petitions are brought under Section 19(b) of that Act. The same order of the Commission is under attack in the District of Columbia, Third, Fifth, and Sixth Circuits. The first petition filed was this one

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[1] 15 U.S.C. § 717 et seq.

in the Tenth Circuit. Venue lies in the Tenth Circuit as to petitioner Sunray DX Oil Company but not as to the other petitioners.

Consideration must be given first to the Commission's motion to dismiss as to petitioner Sunray DX Oil Company for lack of jurisdiction. The Commission says that Sunray has lost its right to object to the order by failure to meet procedural requirements; and that, because Sunray is not aggrieved by the order, it may not bring a petition to review under Section 19(b).

We are met at the start by a barrier of the Commission's making. The Commission has not filed the certified record of its proceedings as required by Section 19(b). Instead it has moved for an enlargement of time for certification of the record "until further order of the Court after resolution of the preliminary issues." In its motion to dismiss Sunray and in its supporting statements and briefs the Commission repeatedly makes record references. Without the record these references are meaningless. In the circumstances we are limited to consideration of the allegations of the petition.

The petition shows that the petitioners entered into separate contracts with various interstate pipeline companies for the sale of natural gas produced from their respective properties located in Texas Railroad Commission District No. 4; that they filed their contracts with the Commission as rate schedules and concurrently filed Applications for Certificates of Public Convenience and Necessity to obtain authority to make their sales for resale in interstate commerce; that the Commission ordered a consolidated hearing; that at the hearing the petitioners jointly offered certain evidence in support of their applications; that the examiner rejected the evidence; that the decision

of the examiner granted the certificates with conditions attached; that the petitioners filed timely exceptions to the examiner's decision; that the Commission sustained the examiner on the rejection of the proffered evidence; and that the Commission held that certificates should be issued subject to the following conditions:

1. An initial price in excess of 16 cents per Mcf was prohibited;

2. Decision on refunds was deferred;

3. A moratorium on price increases in excess of 18 cents was ordered; and

4. Decision on take-or-pay-for contract provisions was made subject to disposition in a rule-making proceeding.

The petitioners duly sought rehearing and, on the same day the rehearing was denied, the petition to review was filed in this court. The petition sets forth the grounds on which relief is sought, incorporates a motion for leave to adduce additional evidence, and concludes with an appropriate prayer for relief.

We find that the petition satisfies the requirements of Section 19(b) and we decline to give consideration to matters said to be established by a record which is not before us. Without the record the grounds asserted in the Commission motion form no basis for the dismissal of Sunray.

The Commission has also moved to dismiss the petition on the ground that venue as to all the joint petitioners does not lie in the Tenth Circuit. The petition alleges venue only as to Sunray.

Section 19(b) provides that a person aggrieved by a Commission order may obtain a review of such order "in the court of appeals of the United States for any circuit wherein the natural-gas company to

which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia."

Section 2112(a) of 28 U.S.C. provides that if proceedings have been instituted in two or more courts of appeals with respect to the same order the board or commission concerned shall file the record in the court where the proceedings with respect to the order were first instituted. The other courts shall then transfer the proceedings before them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice the court in which the record is filed may "transfer all the proceedings with respect to such order to any other court of appeals."

Sections 19(b) and 2112(a) must be read and applied together. The quoted language of Section 19(b) indicates that it is premised on the concept of an order relating to one particular natural-gas company. The Commission has destroyed that concept by consolidating for hearing and disposition separate applications of natural-gas companies which have varying residences and locations of principal places of business. No good purpose would be served by exploring the ramifications of the resulting procedural problems. Each aggrieved party is entitled to a review. The charges and countercharges of forum shopping do not impress us. For better or worse the statutes permit a race to the courthouse with each party trying to get a hearing on its home grounds.

In our opinion the venue deficiencies require a dismissal of the petition as to all petitioners but Sunray. The rights of Sunray are separate and on the face of the pleadings it is entitled to a review of the order attacked. From a practical standpoint this result is

of little importance. The provisions of Section 2112(a) will now come into play.

The various motions are disposed of thus:

1. The Commission's motion to dismiss is granted as to all petitioners except Sunray;

2. The Commission's motion to dismiss Sunray is denied without prejudice to renewal after the record is certified to this court;

3. The motion to adduce additional evidence is deferred to the hearing on the merits; and

4. The motion of the Commission to enlarge the time for certification of the record is denied and the Commission shall file the entire record with the clerk within 15 days from the entry of this order.

II

United States Court of Appeals, Tenth Circuit

NOVEMBER TERM, 1964

No. 7781

SUNRAY DX OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Rehearing

Before BREITENSTEIN, HILL, and SETH, *Circuit Judges*

PER CURIAM

The Commission's petition for rehearing urges that the record is not necessary for a determination of whether Sunray was aggrieved and emphasizes the potential complications in procedure.

We have again reviewed the situation and are convinced that in the case before us the question of ag-

grievement cannot be determined without the record. The parties are not in agreement on the facts. In the absence of such agreement we will not decide the issue on unauthenticated documents attached as appendices to motions and briefs or on unilateral statements made in briefs and oral arguments. This is not a case like *Utah Power & Light Company* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——, decided this day, in which the defect appeared on the face of the petition.

We are aware of the procedural problems mentioned by the Commission and we shall meet those problems when they arise. The procedural entanglements which postpone consideration on the merits of petitions to review Commission orders are regrettable and should have the careful attention of all parties in interest.

The Commission objects to our order which requires the filing of the entire record. We are now convinced that in the circumstances of this case the better procedure is to require a certificate of the materials comprising the record.

Except as stated herein the petition for rehearing is denied. The Commission, in accordance with our Rule 34(7), shall certify a list of the materials comprising the record and file such certificate with the clerk within ten days from the date of the entry of this order.

III

United States Court of Appeals, Tenth Circuit

MAY TERM, 1965

No. 7781

SUNRAY DX OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition To Review Order of Federal Power Commission

Before BREITENSTEIN, HILL and SETH, *Circuit Judges*

BREITENSTEIN, *Circuit Judge:* Sunray DX Oil Company and nine others filed a petition to review the Commission's Opinion 422 and order of March 23, 1964, as affirmed on rehearing by Opinion 422–A and order of May 27, 1964. We sustained the Commission's motion to dismiss all petitioners but Sunray and denied a similar motion to dismiss Sunray without prejudice to the renewal of the motion after certification of the record. See *Amerada Petroleum Corp.* v. *Federal Power Commission,* 10 Cir., 338 F. 2d 808. The Commission then, in accordance with our Rule 34(7), certified and filed with the clerk a list of the materials comprising the record, and renewed its motion to dismiss Sunray. Sunray moved for a clarification of the court's orders reported in 338 F. 2d 808, 810–811. Sun Oil Company then petitioned for leave to intervene. The two motions and the petition in intervention are now before us.

By its Opinion 422 the Commission issued permanent certificates of convenience and necessity to numerous independent gas producers, including Sunray and Sun, whose individual certificate applications had been consolidated for hearing and disposition.

Pursuant to § 19(b) of the Natural Gas Act,[1] petitions for review were filed in the District of Columbia, Third, Fifth, Sixth, and Tenth Circuits with the petition in the Tenth Circuit being filed first. Section 2112(a), 28 U.S.C., provides that if proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency concerned shall file the record in that court where the proceedings were first instituted and the other courts in which such proceedings are pending shall transfer them to the court of appeals in which the record has been filed.

Various petitioners have sought to have the actions filed in circuits other than the Tenth transferred to the Tenth Circuit. The Commission has successfully resisted such motions on the ground that transfer would not be proper until after the determination of jurisdiction in the Tenth Circuit.

Sun filed a petition to review Opinion 422 in the Third Circuit. After the Commission filed in the Tenth Circuit the certificate listing the materials comprising the record,[2] Sun moved for the transfer of its case to the Tenth Circuit. The motion was denied. This action made it impossible for Sun to proceed. Nothing could be done in the Third Circuit because the record was not there;[3] and Sun could do nothing in the Tenth Circuit.

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[1] 15 U.S.C. § 717r(b).

[2] Our Rule 34(7) provides in part: "The filing of a certified list of the material in the record and the holding of such material for and subject to the directions of the clerk of the court shall be deemed the full equivalent of the filing of the entire transcript of the record in the court." The Third Circuit has a similar rule. See its Rule 18(7).

[3] Similarly the petitioners in the District of Columbia, Fifth, and Sixth Circuits could not proceed because of the absence of the record.

Sun then moved to intervene in the instant case. The Commission opposed the motion saying that intervention is not proper because jurisdiction and venue are absent and because Sun has no legally protectible or recognizable interest in the Sunray petition. Our Rule 34(6) permits intervention in actions to review orders of administrative agencies and in proceedings under it we have never required that intervenors establish venue in this circuit.[4] The Commission's argument that Sun has no interest in Sunray's petition to review Opinion 422 is not persuasive. Sun was a party to the administrative proceedings which resulted in Opinion 422 and is substantially affected thereby.

In the situation presented intervention is a permissive matter. The circumstances are such that leave to intervene is granted. By this action we do not intend to say that in other circumstances we would permit intervention by one producer in an action brought by another producer to review a Commission order or that any relief may be granted to intervenor Sun in these proceedings. Sun is entitled to be heard and intervention is a proper vehicle to obtain a hearing.

Opinion 422 dealt with applications for certificates of convenience and necessity sought by producers of gas from properties located in Texas Railroad Commission District No. 4. These producers had contracted with pipeline companies for the sale of the gas. Sunray was an applicant for a certificate. Among other things the Commission by Opinion 422 prohibited an initial price in excess of 16 cents per

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[4] See, for example, *Pan American Petroleum Corp.* v. *Federal Power Commission*, 10 Cir., 339 F. 2d 694, reversed on other grounds —— U.S. ——, June 7, 1965, 33 L.W. 3393.

MCF and ordered a moratorium on price increases in excess of 18 cents per MCF.

Sunray's application was filed on January 23, 1961, and covered a contract for sale of gas from one well to Tennessee Gas Transmission Company for a period of 20 years with an initial price of 17.24347 cents per MCF and an escalation to a maximum of 20.24347 cents per MCF.

On October 9, 1962, the attorney for Sunray wrote the Commission that the well from which it had been delivering gas to Tennessee was shut in, that Sunray had not obtained a cancellation of the gas sales contract and, that because of the lack of cancellation he understood that the Commission would not entertain an application to abandon.[5] The Commission's reply does not appear in the portions of the record reproduced for us. In any event the Commission continued Sunray as a party in the consolidated proceedings, and Opinion 422 and the order entered pursuant thereto apply to Sunray.

The examiner who heard the various applications pointed out in his decision made July 23, 1963, that the temporary certificates issued by the Commission

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[5] The letter read in part: "This will serve to advise that the one gas well from which Sunray has been delivering gas to its purchaser, Tennessee Gas Transmission Company (Tennessee), pursuant to the temporary authorization issued Sunray in the captioned proceeding on February 14, 1961, has been shut-in since April 25, 1962, because of inability of the well to produce gas. Sunray's Engineering Staff has concluded that it is infeasible to do any further work on this well in an effort to make it again a producing gas well. However, no cancellation of the Sunray gas sales contract comprising Sunray's related Rate Schedule No. 210 has been obtained. It is Sunray's understanding that because of such fact, the Federal Power Commission (Commission) would not entertain an Application for Permission to Abandon at this time."

to certain applicants, including Sunray, "do not provide for refunds in the event that the initial public convenience and necessity price is found to be lower than the prices authorized under the temporary certificate authorizations," and did not order any refunds by those applicants. On this point the Commission disagreed with the examiner and held that: "The decision whether refunds should be ordered as a condition to the other certificates [including Sunray's] herein issued is deferred for subsequent determination."

The Comission says that Sunray is not aggrieved and cannot maintain a petition to review under §19(b).[6] The argument is that because Sunray is not producing or selling any gas under its contract with Tennessee, the only injury to Sunray is the possible obligation to make a refund and no such refund has been ordered.

The question is whether Sunray is presently aggrieved.[7] Sunray says that it is aggrieved because the order fixes an initial price lower than the contract price and that it presently has a right to contest that initial price because of its potential bearing on the refund issue.

After the examiner's decision in this case and before the Commission's opinion, the District of Columbia Circuit, in *Public Serv. Comm'n of New York* v. *Federal Power Commission,* D.C. Cir., 329 F. 2d 242, 250, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963, held that

[6] Section 19(b) reads in part: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commision in such proceeding may obtain a review of such order in the court of appeals of the United States * * *."

[7] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 10 Cir., 270 F. 2d 404, 407, 408.

the Commission could order refunds of any amounts collected over the in-line price established in § 7 proceedings even though the temporary certificate contained no refund provision.[8] Perhaps this decision had weight in influencing the Commission to reject the examiner's recommendation on the refund issue. In any event we are convinced that the Commission intends that the in-line price has an important, if not controlling, effect on refunds. Indeed Opinion 422 after referring to the exceptions taken to the examiner's decision says that the amount of refunds is affected by the resolution of the initial price question.[9] In neither brief nor oral argument does the Commission deny the effect of the price determination on the question of refunds.[10] The attitude of the Commission is a real and presently existing threat that the refund obligation of Sunray will be the difference between the collected contract price and the determined initial price.

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[8] In its footnote 8 on page 250 the court points out that its decision may be inconsistent with the Tenth Circuit decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 10 Cir., 270 F. 2d 404.

[9] The language of the Commission is: "* * * all exceptions concern the initial price question in one form or another and even the amount of refunds is affected by the resolution of this issue." Mimeo copy of opinion p. 7.

[10] In commenting on the attitude of the Commission Sun points out the following statement made on page 14 of the Commission's brief in support of its application for certiorari in *Federal Power Commission* v. *Callery Properties, Inc.*, United States Supreme Court No. 756, Oct. 1964 Term: "* * * In our view, a producer who commences service * * * under a temporary certificate issued *ex parte*, should be permitted to collect and retain no higher price than that which he would have received under a properly conditioned permanent certificate. In short, he is entitled to no more than an 'in-line' price until such time as a just and reasonable rate is determined."

In its intervention Sun calls attention to a February 5, 1963, order of the Commission denying the motion of certain distribution companies, which were parties to the consolidated proceedings, either to vacate the unconditioned temporary certificates or to impose indefinite, floorless refund conditions. The theory of Sun is that the effect of this order, from which no appeal was taken, is to preclude the imposition of a refund obligation on a producer to which an unconditioned temporary certificate was issued and, hence, to establish that Sunray is not aggrieved. To determine this point we would have to consider the merits of the case, at least in part.

The contention of Sun emphasizes the difficult position in which the court has been put. We are asked to determine threshold questions which bear on the merits. Perhaps after hearing the merits we would be convinced that Sunray is not aggrieved, but we are not so convinced now. We well recognize the responsibility of the court to be satisfied as to its jurisdiction. We also recognize that in some cases a jurisdictional question is so intertwined with the merits [11] that ruling thereon should be deferred until a hearing of the merits.[12] Ofttimes in Federal Power Commission cases we have deferred the disposition of motions to dismiss until the hearing of the merits and no party has objected.[13] No such route is open

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[11] See *Land* v. *Dollar*, 330 U.S. 731, 735.

[12] See *Fireman's Fund Ins. Co.* v. *Railway Express Agency*, 6 Cir., 253 F. 2d 780, 784, and 2 Moore, Federal Practice, ¶ 12.16, pp. 2274–2275 (2d ed.). See also Rule 12(d), F.R. Civ. P., which permits the deferring of certain defenses including lack of jurisdiction until the trial.

[13] This occurred in the group of cases reported under the style of *Texaco, Inc.* v. *Federal Power Commission*, 10 Cir., 317 F. 2d 796, reversed on other grounds 377 U.S. 33, rehearing denied 377 U.S. 984.

to us in the case at bar. The Commission has made it eminently clear that the petitions to review its Opinion 422 will not move forward until we make a definitive determination of its motion to dismiss. We have no real choice except to decide the motion now.

The District of Columbia Circuit has said that aggrievement within the meaning of § 19(b) "is a status conferred by Congress upon a party who * * * is likely to suffer injury" by an administrative determination,[14] and that "aggrievement must be present and immediate, or at least must be demonstrably a looming unavoidable threat."[15] Although these statements were made in cases where the petitioner was not a gas producer, we see no reason why they should not apply here. Sunray is likely to suffer injury because of the determination of the in-line price. The position of the Commission that a holder of an unconditioned temporary certificate is entitled to retain no more than an in-line price is an unavoidable threat that the Commission will require Sunray to make refunds. The situation is immediately pressing[16] because if Sunray does not question the initial price in this petition to review, it will be forever foreclosed from so doing. We hold that Sunray is an aggrieved party within the meaning of § 19(b).

The other grounds asserted in support of the motion to dismiss deserve little consideration. The Commission says that Sunray did not take exceptions to the examiner's decision. That decision came after Sunray had stopped production from the well serv-

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[14] *City of Pittsburgh* v. *Federal Power Commission*, D.C. Cir., 237 F. 2d 741, 746.

[15] *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, D.C. Cir., 246 F. 2d 688, 694.

[16] *See Eccles* v. *Peoples Bank*, 333 U.S. 426, 432, rehearing denied, 333 U.S. 877.

icing the Tennessee contract and the examiner did not order refunds from those holding unconditioned temporary certificates. The result was that Sunray was not hurt. Sunray's aggrievement did not come until the Commission declined to follow the examiner on this recommendation. By its failure to except Sunray waived nothing. For a waiver to be effective it must be knowledgeable. Sunray had no knowledge that the Commission would upset the examiner on the refund issue.

Finally, the Commission says that the petition for rehearing of its Opinion 422 and order thereon, which under § 19(a) [17] is a condition precedent to court review, was insufficient because it was neither signed nor verified by anyone on behalf of Sunray.[18] If the signing and verification were technically insufficient, the Commission could have rejected the application because of violation of its rules and regulations. Instead it accepted the application for rehearing and acted thereon. In the circumstances the technical objection deserves no further comment.

The petition for leave to intervene is granted. The motion to dismiss is denied. In view of our action on the motion to dismiss, the motion for clarification is moot and, accordingly, denied.

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[17] 15 U.S.C. § 717r(a).

[18] The application for rehearing was filed by ten named producers and verified by the attorney for one of them.

248-571—67——5

APPENDIX C

I

United States of America, Federal Power Commission

AMERADA PETROLEUM CORPORATION, ET AL.,
DOCKET NOS. CI62-1544, ET AL.

Opinion No. 501

Opinion and Order Requiring Refunds

(Issued July 27, 1966)

Before Commissioners: LEE C. WHITE, *Chairman;* L. J. O'CONNOR, JR., CHARLES R. ROSS, DAVID S. BLACK and CARL E. BAGGE

BLACK, *Commissioner:* This certificate proceeding under Section 7 of the Natural Gas Act (Act) originally involved 32 separate applications by 22 producers for initial sales of natural gas in Texas Railroad Commission District No. 4 to various pipelines for resale in interstate commerce for prices ranging from 15.944¢ per Mcf to 19.795¢ per Mcf. Temporary certificates at prices not exceeding 18¢ per Mcf were issued. Refund conditions, included in the temporary certificates in eight of the dockets, would require the producer to refund any amount collected in excess of the initial price set forth in the permanent certificate. In the remaining dockets no refund conditions were imposed in the certificates.

By our Opinion No. 422 issued March 23, 1964 and Opinion No. 422-A issued May 27, 1964 we granted permanent certificates of public convenience and

necessity to the applicants. Each of these certificates was conditioned upon an initial price of 16¢ per Mcf which we found to be the "in-line" price for Texas District No. 4 at the time of execution of the contracts. In those dockets where the producers had commenced delivery pursuant to temporary certificates containing refund conditions we ordered refunds to be made. In the remaining dockets, where no specific refund obligation was included in the temporary certificates, we deferred decision.[1]

The refund issue in this proceeding arose out of the decision of the Court of Appeals for the District of Columbia[2] on appeal from our decision in *Skelly Oil Company*.[3] In the *Skelly* case we had determined that producers operating under unconditioned certificates should not be required to make refunds of amounts collected in excess of the determined "in-line" price. The Court of Appeals, however, reversed our decision and remanded the case with instructions to make, with the assistance of the parties, "a broader and more penetrating analysis of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion." (329 F. 2d 242, 249). While petitions for certiorari were denied by the Supreme Court in the *Skelly* case, similar issues were again raised in petitions for certiorari filed in *United Gas Improvement Corp.* v. *Callery Properties Inc.*, 335 F.

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[1] Paragraph (G) of the order accompanying Opinion No. 422.

[2] *P.S.C. of New York* v. *F.P.C.*, No. 17582, *et al.*, 329 F. 2d 242, (CADC 1964), cert. denied 377 U.S. 963, 1964.

[3] Opinion No. 362, issued August 30, 1962, 28 FPC 401, modified on rehearing by Opinion No. 362–A, 28 FPC 1065. Two dockets (Jake L. Hamon (Operator), *et al.*, No. CI61–922, and Jake L. Hamon, No. CI61–1745) were severed and settlement approved by order issued November 11, 1965. In three other dockets, no amounts were collected in excess of the "in-line" price.

2d 104 (CA5, 1964). After the Supreme Court granted certiorari in the *Callery Properties* case on March 8, 1965, our order of March 29, 1965, in this proceeding provided that "Since it now appears that the refund issue will be reviewed and clarified by the Supreme Court we conclude that no further action can be taken in this proceeding until after the Court has issued a decision in the *Callery* case." On December 7, 1965, the Supreme Court reversed the decision of the Circuit Court of Appeals in the *Callery* case. *United Gas Improvement Corp.* v. *Callery Properties,* —— U.S. ——. "It is now established that the Commission had both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price in the absence of a showing that it would be inequitable to require refunds of either all or part of the excess amounts collected." *Skelly Oil Company,* Opinion No. 492 (June 1, 1966).

In Opinion No. 422 in this proceeding we summarized the standard set by the Circuit Court of Appeals in the *Skelly* case as follows:

> The Court also has stated, however, that the existence of the power to order refunds at the time of permanent certifications does not mean that its exercise is mandatory. The standard to be followed is the standard of equity, and the decision as to whether refunds should be ordered is to turn on equitable considerations. The existence of a refund requirement is one such consideration but is not controlling; the public interest factors must also be weighed and may be adequate to offset the absence of an explicit condition. (Mimeo., p. 21.)

To permit a more detailed consideration of the equitable factors, the Commission deferred its decision on the refund issue to give the parties an opportunity to brief the issue in light of the Court's

opinion in the *Skelly* case. Briefs were filed by Texaco Inc., Standard Oil Company of Texas, (Sotex), George H. Coates, Lamar Hunt, Sun Oil Company, New York Public Service Commission, Pennsylvania Public Utility Commission, and by Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company, American Petrofina Company of Texas, Jake L. Hamon, and Humble Oil & Refining Company have adopted the brief filed by Texaco Inc. Reply briefs have been filed by Texaco Inc., Sun Oil Company, Clark Fuel Producing Company (Operator), *et al.*, and Jake L. Hamon. Motions for an evidentiary hearing on the question of refunds were filed by Texaco Inc., *et al.*, Sun Oil Company and Clark Fuel Producing Company.

The producers' briefs present arguments which fall into two general classifications: first, arguments directed to the Commission's authority to order refunds of amounts collected under unconditioned temporary authorizations; and, second, arguments dealing with the various equitable considerations. The cited cases have established the Commission's power to order refunds under these circumstances; the issue to be determined is whether it is equitable for us to do so.

The producer's major arguments on the equitable side may be summarized as follows:

(1) The ordering of refunds after issuing temporary certificates without refund conditions would result in entrapment, since the producers had every reason to be assured that no refunds would be required. Budgeting and planning have been carried out in reliance on the Commission's indicated policy of no refunds without refund conditions.

(2) Payments of state taxes and royalties, based

on the sales price of the gas, were made without protest or provision for recoupment in reasonable reliance upon the price in the unconditioned temporary certificates. The tax overpayments will have to be assumed as a loss; and the recovery of royalties will be a very difficult and in most instances, an impossible task.

(3) The doctrine of mutuality argues against ordering refunds. Amounts collected through excessive rates during the interim period of the temporaries are offset when the producers are required to sell their gas under conditions which prohibit rate increases and thus prevent producers from even collecting subject to refund what they consider a just and reasonable rate.

(4) The distributing companies failed to refund to consumers amounts received from pipeline suppliers pursuant to Commission refund orders, and refunds to them would be windfalls.

(5) There is a need to be able to rely on the Commission's orders. The basic financial stability of the producing industry requires that producers be assured that amounts collected under filed rates without refund condition may be retained and further invested in business operations. To make the provisions of temporary certificates subject to retroactive adjustment would create a serious restraint on the alienation of producing properties and adversely affect the future financing of industry drilling programs.

It is implicit in the opinion of the Supreme Court in the *Callery* case, as well as the opinion of the Court of Appeals in the *Skelly* case, that the fact that the producers reasonably and in good faith believed that they were entitled to collect their rates without being subject to a refund obligation is insuffi-

cient, by itself, to avoid the refund obligation. To the same effect are our decisions in *Skelly Oil Company*, Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492-A (July 21, 1966); *Hawkins & Hawkins*, Opinion No. 498, (July 22, 1966); *Turnbull & Zoch Drilling Co.*, Opinion No. 499, (July 25, 1966). Nor are the budgeting and planning activities of the producers, in reliance upon their right to retain the full rates collected, sufficient to prevent refunds being required, although special provisions for delayed repayment may be made if this is shown to be necessary. The burden of preparing revised tax returns would necessarily be present in each case, and is insufficient, without more, to avoid the refund obligation.

The argument that distributors have failed or may fail to pass refunds received by them on to the ultimate consumers is not a ground for defeating the refund obligation of the producers, although it may be a ground for requiring that refunds be placed in escrow or that the producer retain them, paying interest thereon, until suitable arrangements can be made to see that refunds are flowed through to the public, either in the form of direct refunds or of lower rates. *Skelly Oil Company*, Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492-A (July 21, 1966); *Hawkins & Hawkins*, Opinion No. 498 (July 22, 1966); *Turnbull & Zoch Drilling Co.*, Opinion No. 499 (July 25, 1966).

It would be inequitable, however, and contrary to the cited cases for this Commission to order producers to make refunds of amounts which have been paid out in taxes or in royalties in reasonable reliance upon a prior Commission order, and which amounts cannot now be recouped. It appears from prior cases that recovery of royalties so paid out would be so ex-

pensive as to be impractical. *Skelly Oil Company,* Opinion No. 492 (June 1, 1966), amended and confirmed Opinion No. 492–A (July 21, 1966); *Hawkins & Hawkins,* Opinion No. 498 (July 22, 1966). These cases also determined that refunds of state production taxes, paid out in reasonable reliance upon a Commission order, should not be ordered except to the extent such taxes are recoupable by credit or otherwise. In all these cases it was determined that from February 1, 1964, one week after the decision of the Court of Appeals in *Skelly* that refunds might be ordered under these circumstances, no producer was entitled as a matter of equity to assume that no refunds would be ordered. To these established principles we adhere.

Accordingly, the producers listed in Appendix A hereto will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates, with the exception of royalty and overriding royalty payments made prior to February 1, 1964, to the extent attributable to the excess amounts collected, and with the further exception of state production taxes paid prior to February 1, 1964, to the exent attributable to the excess amounts collected, and not now recoupable by credit or otherwise.

There appears to be no need for reopening the proceedings to permit the introduction of additional evidence. The statements of the producers in their briefs have been accepted at face value for the purposes of this proceeding. The motions to reopen the proceedings will be denied.

The Commission orders:

(A) As a condition of the certificate granted in each of the dockets listed in Appendix A hereto, each certificate holder shall file within 60 days of the effec-

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tive date of this order a report of the amounts collected by said certificate holder in excess of 16 cents per Mcf at 14.65 psia, less any amounts specified in ordering paragraphs (B), and (C). Interest to the date of this order shall be added at the rate of 6 percent per annum on all such excess amounts collected prior to March 1, 1960, and at the rate of 7 percent per annum on all such excess amounts collected on or after March 1, 1960, except that no interest shall be included on refunds to the extent state production taxes, paid but recoupable, are included in such refunds, and interest shall not exceed the legal rate recoverable by the certificate holder on that portion of the amount of any refund which was in fact paid over by certificate holder, not for his own benefit, to any third party prior to February 1, 1964.

(B) Each certificate holder listed in Appendix A hereto, may omit from the reports required by ordering paragraph (A) any amount by which payments made before February 1, 1964, of royalties and overriding royalties were increased by reason of the difference between the price of 16 cents per Mcf and the rates actually collected, and any amounts by which payments made before February 1, 1964, of state production taxes, not recoupable by credit or in any other manner, were increased by reason of said difference.

(C) The reports required by ordering paragraph (A) shall not include excess rates collected during any period when an increased rate in the docket in question was subject to possible refund in proceedings pursuant to Section 4(e) of the Natural Gas Act.

(D) Notwithstanding any other provision of this order, any state production taxes paid prior to February 1, 1964 by any party listed in Appendix A hereto, shall be required to be subject to the provisions of ordering paragraph (H) and the interest pay-

ments required thereby only from the time and to the extent that such excess tax payments may be recouped by credit or otherwise.

(E) Each report required by ordering paragraph (A) shall set forth the amount of refund related to each subject rate schedule (showing separately the principal and applicable interest, with the reasons for differing rates of interest on different portions of the principal), the basis used for such determination, the period covered and a letter from the purchaser of the gas agreeing to the correctness of the amounts.

(F) Copies of all filings made pursuant to ordering paragraph (A) hereof shall be served at the time of filing upon all participants who within 45 days of the issuance of this order shall so request in writing, and upon the purchaser of the gas.

(G) Each certificate holder listed in Appendix A hereto shall retain the amounts shown in the reports required under ordering paragraph (A) subject to further order of the Commission directing the disposition of those amounts. If any such certificate holder elects to commingle these retained refunds with its general assets and use them for its corporate purposes, it shall pay interest thereon at the rate of 5¾ percent per annum on all funds thus available from the date of the filing of the refund report to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final order of the Commission. If the certificate holder elects to deposit the retained refunds in a special escrow account, the certificate holder shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement, conditioned as set out below accompanied by certificate showing service of a copy thereof upon each of its jurisdictional customers. Unless notified to the contrary by the Secretary with-

in 30 days from the date of filing thereof, the Escrow Agreement shall be entered into between the certificate holder and any bank or trust company used as a depositor for funds of the United States Government and the agreement shall be conditioned as follows:

(1) Certificate holder, the bank or trust company, and the successors and assigns of each, shall be held and formally bound unto the Federal Power Commission for the use and benefit of those entitled thereto, with respect to all amounts and the interest thereon deposited in a special escrow account, subject to such Agreement, and such bank or trust company shall be bound to pay over to such person or persons as may be identified and designated by final order of the Commission and in such manner as may be therein specified, all or any portion of such deposits and the interest thereon.

(2) The bank or trust company may invest and reinvest such deposits in any short-term indebtedness of the United States or an agency thereof or in any form of obligation guaranteed by the United States which is, respectively, payable within 120 days as the said bank or trust company in the exercise of its sound discretion may select.

(3) Such bank or trust company shall be liable only for such interest as the invested funds described in paragraph (2) above will earn and no other interest may be collected from it.

(4) Such bank or trust company shall be entitled to such compensation as is fair, reasonable and customary for its services as such, which compensation shall be paid out of the escrow account to such bank or trust company. Said bank or trust company shall likewise be entitled to reimbursement for its reasonable expenses necessarily incurred in the administra-

tion of this escrow account, which reimbursement shall be made out of the escrow account.

(5) Such bank or trust company shall report to the Secretary of this Commission quarterly, certifying the amount deposited in the trust account for the quarterly period.

(H) Any certificate holder may apply to the Commission, within 15 days of any order directing payment of any or all amounts held by any certificate holder pursuant to ordering paragraph (G), for leave to make payments over a period of time in discharge of its refund obligation.

(I) The motions for a hearing for this presentation of evidence are hereby denied.

By the Commission. Commissioner O'Connor dissents for the reasons expressed in his dissents in Skelly Oil Company, *et al.*, Opinion No. 492 (June 1, 1966), and H. L. Hawkins & H. L. Hawkins Jr., (Operator), *et al.*, Opinion No. 498 (July 22, 1966).

(SEAL) JOSEPH H. GUTRIDE,
Secretary.

	Docket Nos.
American Petrofina Company of Texas	CI61-1418
Cherosage Enterprises Inc., *et al.* (Now: Patchin-Wilmoth Industries Inc., *et al.*)	CI62-1459
Clark Fuel Producing Company (Operator), *et al*	CI61-1279
Coates, George H	CI62-355
Cox, Edwin L	CI62-621
H. H. Phillips, Jr., *et al*	CI62-954
Hudson, W. H. (Operator), *et al*	CI62-1074
Humble Oil & Refining Company	CI62-704
Hunt, Lamar	CI61-780
Sohio Petroleum Company (Operator), *et al.* (formerly Katz Oil Company (Operator), *et al.*)	CI61-627
McWood Corporation	CI61-839
McWood Corporation	CI62-708
Monsanto Company	CI61-876
Standard Oil Company of Texas (Division of California Oil Company)	CI61-1377

	Docket Nos.
Standard Oil Company of Texas (Division of California Oil Company)	CI62-1140
Sun Oil Company	CI61-657
Sun Oil Company	CI61-1101
Sun Oil Company	CI61-1584
Sun Oil Company	CI61-956
Sunray Mid-Continent Oil Company (Name changed to Sunray DX Oil Co.)	CI61-1103
Texaco Inc.	CI61-961
Texaco Inc.	CI61-1757

II

United States of America, Federal Power Commission

AMERADA PETROLEUM CORPORATION, ET AL., DOCKET Nos. CI62-1544, ET AL.

Opinion No. 501-A

Memorandum Opinion and Order Confirming Order Requiring Refunds and Denying Motions for Stay

(Issued December 6, 1966)

Before Commissioners: LEE C. WHITE, *Chairman;* L. J. O'CONNOR, JR., CHARLES R. ROSS, CARL E. BAGGE, and JOHN A. CARVER, JR.

On July 27, 1966, the Commission issued Opinion No. 501 and its accompanying order in this proceeding, requiring refunds by certain natural gas producers of a part of the amounts collected by them in excess of the 16 cents per Mcf later determined to be the proper initial rate. Because these excess amounts were collected while operating under temporary certificates without express refund conditions, and because a balancing of the equities indicated that refunds in full should not be ordered, no refunds were required of certain excess amounts collected but later disbursed in production tax payments which cannot

be recouped or in royalty payments. Applications for rehearing have been filed by Texaco, Inc. (Texaco), Sunray DX Oil Company (Sunray), Standard Oil Company of Texas, a division of Chevron Oil Company (Sotex), Edwin L. Cox (Cox), Clark Fuel Producing Company (Operator), *et al.* (Clark), George H. Coates (Coates), Humble Oil & Refining Company (Humble), Sohio Petroleum Company (Sohio), Lamar Hunt (Hunt), American Petrofina Company of Texas (Petrofina), Patchin-Wilmoth Industries, Inc. (Patchin-Wilmoth), and Sun Oil Company (Sun). Motions for stay of the ordering clauses of Opinion No. 501 were made by a majority of the applicants. By order issued September 2, 1966, we granted rehearing for the purpose of reconsideration.

In general, the applications for rehearing reiterated arguments previously considered and rejected by this Commission in Opinion No. 501 and in *Skelly Oil Company, et al.*, Opinions Nos. 492 and 492–A (1966), and *H. L. Hawkins & H. L. Hawkins, Jr.* (*Operator*), *et al.*, Opinions Nos. 498 and 498–A (1966). We have found nothing in the applications for rehearing which would cause us to alter our prior determinations. Certain statements in these applications, however, deserve comment.

Hunt alleges "The Commission erred in concluding that Hunt had notice of a potential refund obligation subsequent to February 1, 1964." (Hunt application, page 9.) This argument was dealt with in *H. L. Hawkins & H. L. Hawkins, Jr.* (*Operator*), *et al.*, Opinion No. 498–A:

> Some of the applicants argue that refund of excess amounts collected but later paid out in royalties should not be required even after February 1, 1964. We held that on that date producers should be considered to have knowledge that refunds might be required by reason of

the doctrine declared by the Court of Appeals for the District of Columbia in *PSC of the State of New York* v. *F.P.C.*, 329 F. 2d 242, issued January 23, 1964. As a legal matter the producers, like any other persons, might be charged with knowledge of what the law was, even prior to the time that it was first declared by a court and even though the Commission had previously held a different view. As a matter of equity, however, we think that the producers should not be charged with the knowledge of the law as declared by the Court of Appeals prior to the time of that court's decision. From the time this view of the law was enunciated by the court, every producer either knew or should have known that refunds might be required of excess amounts collected under temporary certificates, even though these certificates contained no explicit refund conditions. (Pages 3-4.)

Sotex and Clark object to the equities in the present case being determined by the Commission on the basis of Opinions Nos. 492, 492-A, 498 and 499, to which Sotex and Clark were not parties. (Sotex application, page 7; Clark application, page 6). Neither Sotex nor Clark nor any other applicant in this proceeding is being held responsible for refunds on the basis of facts established in other proceedings. These applicants have had full opportunity to set forth any facts and any evidence which they wished to present with respect to their particular circumstances in this proceeding. Clark and Sotex have alleged no facts which would serve to differentiate their cases from those cited by us. These cases were cited as established precedents applicable to the present proceeding, and not as establishing the facts in this proceeding.

Several applicants contend that they were improperly deprived of an opportunity to present evidence

on the nature of their budgeting and planning activities "and how disastrous the ordering of refunds will be on such activities." (Texaco application, page 3; Humble application, page 5.) According to figures submitted by the two companies, the total refund exposure of Humble in this proceeding in under $25,000 and the total refund exposure of Texaco is under $1,500. No serious arguments can be made that refunds of these amounts would seriously disrupt the fiscal activities of corporations such as Humble and Texaco. The broader arguments made by others that such "retroactive rate making" will have detrimental effect on the industry's ability to plan, budget and finance future drilling (Sunray application, page 3) or upon the financial stability of producers (Cox, page 4) have been fully considered by the Commission and found to be without merit.

Patchin-Wilmoth states that it has built three miles of pipeline with a metering station and compression plant at a total cost of $33,943.56 for the purpose of delivering the gas to the pipeline purchaser. Five cents per Mcf of the 18 cents per Mcf contract price was allotted to it by the other working interest owners as reimbursement for the building of the facilities. After recovery of the cost of construction 3.5 cents was allotted as compensation for maintenance of the pipeline, metering station and compression plant. Pursuant to Opinion No. 422, which directed an initial price of 16 cents per Mcf, the total price to seller was reduced to 16 cents. Thereafter, in March 1966, the gas field became nonproductive, causing Patchin-Wilmoth to sustain substantial loss both in the drilling and equipping of its wells and the construction of the delivery facilities.

A loss sustained on an individual producing property is not ground for refusal to order refunds. The initial price to which seller was entitled has previously

been determined in this proceeding (Opinion No. 422), and we think that this price should be the measure of the refunds to be required here.

No substantial reason has been advanced why stay should be had of the ordering paragraphs of Opinion No. 501. Those paragraphs did not provide that refunds should be made; they provided only that the amounts of such refunds should be computed and that these amounts should be placed in escrow or retained by the producers pending further order of the Commission. In the event the in-line price is modified by court order, this will be taken into account in a later order disposing of the refund amounts.

The Commission finds:

(1) The assignments of error and applications for rehearing filed in this proceeding present no new facts or legal principles which would warrant any change in, or modification of, the Commission's Opinion No. 501 in this proceeding issued July 27, 1966.

(2) No good cause exists for granting the motions for stay of the ordering paragraphs of said Opinion No. 501.

The Commission orders:

(A) Opinion No. 501 and its accompanying order, issued July 27, 1966, are in all respects confirmed.

(B) The relief requested on rehearing in the applications for rehearing filed in this proceeding is hereby denied.

(C) The motions for stay of the ordering paragraphs of Opinion No. 501 are denied.

By the Commission. Commissioner O'Connor dissenting filed a separate statement appended hereto. Commissioner Carver not participating.

(SEAL) JOSEPH H. GUTRIDE,
Secretary.

AMERADA PETROLEUM CORPORATION ET AL., DOCKET NOS. CI62–1544 ET AL. (OPINION NO. 501–A)

(Issued December 6, 1966)

O'CONNOR, *Commissioner*, dissenting: In accordance with my dissent from the majority opinion in Opinion No. 501, I would grant the relief requested in the applications for rehearing. In addition, I would add further comments with regard to Patchin-Wilmoth Industries, Inc., *et al.* (Successor to Cherosage Enterprises, Inc.) (Patchin-Wilmoth).

On April 10, 1962, Patchin-Wilmoth entered into a gas sale contract with Natural Gas Pipeline Company of America (Natural) wherein Patchin-Wilmoth agreed to sell gas to Natural at a fixed price of 18.00 cents per Mcf without escalations for a period of 20 years. To make this sale, Patchin-Wilmoth constructed three miles of lateral line for delivery to Natural's main line as well as a metering station and compression plant. These facilities cost approximately $33,943.00.

On March 23, 1964, the Commission issued Opinion No. 422, *Amerada Petroleum Corporation et al.*, Docket Nos. CI62–1544 *et al.* which set an initial price of 16.00 cents per Mcf for the gas in Patchin-Wilmoth's production area. In compliance therewith, the 18.00 cents price paid by Natural was reduced to 16.00 cents. Two years later, in March 1966, Patchin-Wilmoth's gas field became non-productive.

Total refunds owed by Patchin-Wilmoth are estimated to be $2,750.00. Furthermore, Patchin-Wilmoth has no other certificates on file with the Commission nor does it appear that it owns a working interest in any other properties for which rate schedules are on file with this Commission. During the period of production, revenues fell far short of

costs and as a result, the company has suffered a substantial loss. Therefore, in light of the minimal refunds involved; the construction of delivery facilities by the seller; the fact that production has ceased; the limited amount of gas that was recovered; and, the substantial loss on investment, the majority, by the ordering refunds, has shown an utter disregard of the equities involved and accordingly I dissent.

LAWRENCE J. O'CONNOR, JR.,
Commissioner.

APPENDIX D

JUDGMENT

Nineteenth Day, November Term, Friday, December 9th, 1966

Before Honorable JEAN S. BREITENSTEIN, Honorable DELMAS C. HILL and Honorable OLIVER SETH, *Circuit Judges*

These causes came on to be heard on petitions to review orders of the Federal Power Commission and motions to adduce additional evidence and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the motions to adduce additional evidence are severally denied, and the causes remanded for further proceedings consistent with the opinion of the court.

By order of January 7, 1967, the mandate of the United States Court of Appeals was stayed to February 13, 1967.

By order of February 10, 1967, the mandate of the United States Court of Appeals was stayed to March 6, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967